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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

STATE OF MONTANA,)

Plaintiff and
Counterclaim Defendant,)

vs.)

ATLANTIC RICHFIELD COMPANY,)

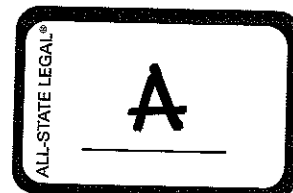
Defendant and
Counterclaimant.)

NO. CV-83-317-B-PGH

MEMORANDUM AND ORDER

In the present action, the State of Montana ("the State") seeks to recover monetary damages from Atlantic Richfield Company ("ARCO"), for injuries to natural resources in the Upper Clark Fork River Basin¹ allegedly caused by the release of hazardous

1. The Clark Fork River Basin has its headwaters near Butte, Montana, and flows to the Idaho border. The natural resources alleged to have been injured are located from the headwaters of the Clark Fork River to the Milltown Reservoir near Missoula, Montana.



substances by ARCO and its predecessors-in-interest. The claims advanced by the State are premised upon the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.*, ("CERCLA"); and the Montana Comprehensive Environmental Clean-up and Responsibility Act ("CERCA"), Mont. Code. Ann. §§ 75-10-701, *et seq.*² The State invokes the court's federal question jurisdiction, pursuant to 28 U.S.C. § 1331, together with its supplemental jurisdiction under 28 U.S.C. § 1367.³

The State of Montana filed the present action on December 12, 1983. Given the magnitude of the factual issues involved, the case has proceeded through extensive pretrial procedures in order to afford the parties sufficient time to adequately assess the complex ecological system involved, and to determine and quantify the natural resource injuries and damages at issue. In that regard, proceedings in the present case were stayed essentially from August 24, 1984, to December 5, 1989, at which time ARCO

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2. Section 107 of CERCLA authorizes State officials, acting as public trustees, to institute actions against responsible parties to recover damages for the harm to natural resources caused by the release of hazardous substances. *See*, 42 U.S.C. § 9607(f)(1).

Section 101 of CERCLA, 42 U.S.C. § 9601(16), defines "natural resources" as all "land fish, wildlife, biota, air water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States . . . , and State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

3. The defendant, ARCO, has advanced counterclaims against the State under CERCLA for, *inter alia*, contribution for response costs (clean-up costs) incurred at 4 National priority List Superfund sites located in the Clark Fork River Basin.

filed its Answer to the original Complaint.⁴ Proceedings were again stayed for a significant period of time upon joint motion of the parties for the purpose of affording the parties an adequate opportunity to explore the possibility of effecting a compromise agreement and settlement of the controversy. The latter stay extended from March 22, 1993, to October 4, 1994, at which time the court entered a comprehensive scheduling order to guide the ultimate disposition of the case. The referenced scheduling order established a deadline of December 18, 1996, for the parties' submission of a proposed final pretrial order.⁵

On October 17, 1994, the Confederated Salish and Kootenai Tribes filed an Application seeking permission to intervene in this action as a matter of right pursuant to section 113(i) of CERCLA, 42 U.S.C. § 9613(i), in conjunction with Fed.R.Civ.P. 24(a)(2).⁶ The terms of 42 U.S.C. § 9613(i) are virtually identical to the terms of

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4. The stay was entered until the United States of America completed its remedial investigation and study on remediation alternatives for the Superfund sites located in the Clark Fork River Basin.
 5. The date for filing the proposed pretrial order was subsequently changed, upon stipulation of the parties, to December 20, 1996.
 6. 42 U.S.C. § 9613(i) provides, in pertinent part, as follows:

In any action commenced under this chapter . . . in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless . . . the State shows that the person's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a)(2).⁷ Although the terms of 42 U.S.C. § 9613(i) and Rule 24 are virtually identical with regard to the showing required to justify intervention as of right, the two differ with respect to who bears the burden of proof upon the issue of adequate representation by existing parties. Section 9613(i), unlike Rule 24, does not place the burden upon the applicant in intervention to show that its interest is not adequately represented.⁸ Rather, section 9613(i) expressly acknowledges that where a State opposes intervention by an applicant who has demonstrated that the elements of "interest" and "impairment" are satisfied, the State bears the burden of showing the applicant's interest is adequately represented by existing parties.

7. Fed.R.Civ.P. 24(a)(2) provides as follows:

Upon timely application anyone shall be permitted to intervene in an action:

* * *

- (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

8. See, e.g., Gottlieb v. Wiles, 11 F.3d 1004, 1008 (10th Cir. 1993) (under F.R.Civ.P. 24 would-be intervenors bear burden of showing inadequacy of representation).

The Tribes also seek leave to permissively intervene in the action pursuant to Fed.R.Civ.P. 24(b)⁹, asserting their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

The State opposes the Tribes' request for intervention. With respect to the Tribes' claim of entitlement to intervention as a matter of right, the State asserts the application should be denied upon the following alternate grounds:

- (1) The Application is untimely;
- (2) The ability of the Tribes to protect their claimed interests in the natural resources at issue in this litigation will not, as a practical matter, be impaired by disposition of the present action; and
- (3) The interests of the Tribes as pled in the proposed Complaint in Intervention are being adequately represented by the State.

With respect to the Tribes' Application for Permissive Intervention, the State suggests that if the Tribes are allowed permissive intervention, the intervention be limited in the following respects:

- (1) The intervention should be conditioned on compliance with the case management order entered by the court on October 3, 1994;

9. Fed.R.Civ.P. 24(b) provides, in pertinent part, as follows:

(b) Permissive Intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

- (2) The intervention should be limited to the claims advanced by the Tribes which are based upon the Hillgate Treaty, July 16, 1855 (12 Stat. 975, ratified 1859); and
- (3) The Tribes should be expressly excluded from participating in the evidentiary phase of the trial involving establishment of ARCO's liability for the natural resource damage claims advanced by the State in its Complaint, as amended.

Having reviewed the record, together with the briefs submitted by respective parties, the court deems it appropriate to allow the Tribes a right of permissive intervention in this action for the limited purpose of prosecuting any natural resource damage claims they have against ARCO, which are separate and distinct from the natural resource damage claims advanced by the State. In that regard, the Tribes shall be allowed to attend the trial in this matter, but not participate in the presentation of evidence. As discussed in the court's scheduling order dated January 21, 1997, the evidentiary phase of the trial shall be divided into five (5) distinct segments. The first three (3) segments shall address, inter alia, the determination and quantification of injuries to aquatic resources, terrestrial resources and groundwater resources alleged by the State. Upon the conclusion of the presentation of evidence in each of these natural resource segments, the Tribes may identify, via motion, with supporting brief, any natural resource damage claims they have against ARCO separate and distinct from the natural resource damage claims advanced by the State. If the Tribes are successful in convincing the court that they possess natural resource damage claims against ARCO which are (1) unique to the Tribes, and (2) cognizable under CERCLA, the Tribes shall be permitted to conduct discovery and present evidence on the claims in a separate proceeding following the trial in this matter.

On January 6, 1997, the court issued an Amended Order establishing a settlement conference in this matter to convene on January 27, 1997, before the Honorable Richard W. Anderson, United States Magistrate Judge, in Billings, Montana. In accordance with the present order, the Tribes shall be permitted to attend the settlement conference and submit a settlement brochure to Magistrate Anderson for his consideration. The extent of the Tribes participation in the settlement conference shall be left to the discretion of Magistrate Anderson.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the Tribes' application for permissive intervention in this matter is GRANTED, subject to the limitations described above.

The Clerk of Court is directed to notify counsel for the respective parties of the entry of this order.

DATED this 21 day of January, 1997.

PAUL G. HATFIELD

PAUL G. HATFIELD, SENIOR JUDGE
UNITED STATES DISTRICT COURT